

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BECKY PINKSTON-POLING,

Plaintiff,

No. 1:15cv1208

vs.

ADVIA CREDIT UNION,

Defendant.

Before:

THE HONORABLE GORDON QUIST,  
U.S. District Judge  
Grand Rapids, Michigan  
October 5, 2016  
Motion to Dismiss Proceedings

APPEARANCES:

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On behalf of the Plaintiff;

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                  On behalf of the Defendant.

6                   TRANSCRIBED BY: MS. KATHY J. ANDERSON, RPR, FCRR  
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October 5, 2016

PROCEEDINGS, 11:00 a.m.

THE COURT: Welcome to the United States District Court for the Western District of Michigan. We're here in the case of Becky Pinkston-Poling against Advia Credit Union, motion to dismiss filed by defendant. Can I have the appearance of counsel, please.

MR. MCCUNE: Good morning again, Your Honor. Richard McCune for the plaintiff.

THE COURT: Okay.

MR. WILSON: Brandon Wilson appearing on behalf of Advia Credit Union.

THE COURT: I'm sorry.

MR. GOODMAN: Philip Goodman for plaintiff.

THE COURT: Brandon Wilson?

MR. WILSON: Yes, sorry, Your Honor.

THE COURT: Okay. You may all be seated. We're here on the oral argument on defendant's motion to dismiss. As an aside, I said to my law clerk walking out here you must have drawn the least competent judge on these issues in the Western District of Michigan. You're looking at a judge whose wife took away from him check writing privileges 50 years ago.

But anyway, here we are. I did my best to understand it. I think I do understand it. And nothing to do with anything that happens in my family, of course. But let me just

1 run through some things because I wanted to make sure I  
2 understand what everybody is talking about.

3 And it starts out with definitions. One is the ledger  
4 balance. The ledger balance as I understand it is the term  
5 that the plaintiff uses to refer to the actual balance in the  
6 checking account, unreduced by pending charges. Is that  
7 basically correct?

8 MR. MCCUNE: Yes, Your Honor, it is, without pending  
9 charges as well as checks or deposits that haven't cleared yet.

10 THE COURT: Non-cleared items.

11 MR. MCCUNE: So it's both the debit holds as well as  
12 the deposit holds.

13 THE COURT: All right. Well, the example is that if a  
14 customer has a hundred dollars in their account but there is a  
15 pending debit of \$20 that's not been posted to the account then  
16 the ledger balance would be a hundred dollars. In other words,  
17 it hasn't cleared, the items -- it's the items that have not  
18 cleared that makes the difference that we are talking about.

19 MR. MCCUNE: Right. They have not come in for payment  
20 yet.

21 THE COURT: All right. And the actual balance, how  
22 does -- how is that distinguished from the ledger balance?

23 MR. MCCUNE: The actual balance and the ledger balance  
24 in the banking credit union world are used interchangeably.

25 THE COURT: Okay. I've got that too. Then the

1 available balance is the ledger or the actual balance minus the  
2 pending charges, for example, use of the cash card, checks  
3 outstanding, things like that.

4 MR. MCCUNE: Things that haven't --

5 THE COURT: The bank would show on some record but  
6 hadn't cleared on their own books yet.

7 MR. MCCUNE: Well, actually haven't been paid yet.

8 THE COURT: Haven't been paid yet.

9 MR. MCCUNE: So for debit card, how it works is the  
10 debit card, if I go to Wal-Mart and I put my debit card and say  
11 I want a ten dollar charge, it goes through the computer system  
12 to Advia Credit Union which authorizes it or declines it.

13 THE COURT: Okay.

14 MR. MCCUNE: And then a couple days later it comes in  
15 for payment.

16 So it's the coming in for the payment part when Advia  
17 actually pays the transaction is when it reduces the actual  
18 ledger balance.

19 THE COURT: All right. Then you're saying that what  
20 this particular credit union does, Advia does, is that it takes  
21 into account those things that have not cleared in determining  
22 whether there's an overdraft.

23 MR. MCCUNE: Right. It takes into account those that  
24 have not yet paid.

25 THE COURT: Not yet paid. Okay. I use the word --

1 is there a difference between paying and clearing?

2 MR. MCCUNE: There is not except for the language that  
3 they use in their contract. So the contract says an overdraft  
4 is when there is not sufficient funds or money to cover or pay  
5 the transaction.

6 THE COURT: All right.

7 MR. MCCUNE: So I think it's an important distinction  
8 maybe for the contract language, but it has the same meaning.

9 THE COURT: Okay.

10 MR. WILSON: Your Honor.

11 THE COURT: You'll get a chance. Let me just go there  
12 with him a minute and you'll get more than enough time.

13 All right. Then you argue on behalf of the plaintiff  
14 that Advia should have used her ledger actual balance, we went  
15 through that, and she would not have been overdrawn and  
16 wouldn't have been hit with those fees that you talk about in  
17 your complaint.

18 MR. MCCUNE: Right. If I could give you an example.

19 THE COURT: Yeah, go ahead. Don't worry.

20 MR. MCCUNE: So for just simplicity sake, let's assume  
21 that I had \$10 in my account, and I go and buy a Starbucks this  
22 morning for 4 bucks. And then my wife using her card goes to  
23 McDonalds at lunch for \$8. So I have a 4 there and an \$8  
24 equals 12. Those are both taken away from the available  
25 balance. So tomorrow when those come in, both of them become

1        overdrafts. Even though neither of those transactions are  
2        greater than the, than the balance. So it wouldn't matter what  
3        order they came in. If the \$4 one came in first, the \$8 one  
4        came in first, it doesn't matter. But what this process does  
5        is turn what should have been one overdraft fee, we are not  
6        disputing that, one overdraft fee into two overdraft fees.

7                THE COURT: Okay. Okay. Good. Okay. You may be  
8        seated. All right. Mr. Wilson, where was he wrong and move  
9        forward with your motion.

10              MR. WILSON: I think he is wrong first and foremost --

11              THE COURT: I'm just talking about definitions now.

12              MR. WILSON: Sure. Definitions, I agree with his  
13        definition as to what the actual or ledger balance is. The  
14        only thing I want to make clear is that when we talk about  
15        available balance and the transaction has been authorized, so,  
16        let's give the example, let's say the plaintiff goes and buys  
17        groceries. She swipes her Advia debit card, the transaction is  
18        approved by Advia because there's money in the account, but  
19        then Advia becomes responsible for transferring those funds to  
20        the merchant, let's say the grocery store. And so it's not  
21        fair to say that essentially Advia turns a blind eye to these  
22        transactions which are initiated, they are approved and Advia  
23        has to pay for, but because of a delay in the transfer of  
24        electronic funds in this day and age, that somehow we can't  
25        take that into consideration when determining her account

1 balance.

2 And so I don't know if I have --

3 THE COURT: They didn't say that -- their complaint is  
4 not quite that you cannot do it. What I read their complaint  
5 to say is that you haven't done it. In other words, the  
6 agreements don't claim, the agreements don't give you the right  
7 to do that. That's the way I understand it.

8 MR. WILSON: I agree with that.

9 THE COURT: Am I right or wrong?

10 MR. MCCUNE: You are right, Your Honor. We are not  
11 challenging the practices themselves.

12 THE COURT: Right. That doesn't violate anything.  
13 It's just that they have an agreement and you're saying they  
14 violated the agreement by doing that.

15 MR. MCCUNE: Their only right to an overdraft fee is  
16 from that contract.

17 THE COURT: Right.

18 MR. MCCUNE: They can't just pull money out of my  
19 account.

20 THE COURT: Right.

21 MR. MCCUNE: So it comes from the contract.

22 THE COURT: Right, that's the way I understand it.  
23 Okay.

24 MR. WILSON: And, Your Honor, if I could speak to that  
25 point. The contract does allow us to do that. There's two



1 different places, they are both on, if you look at docket  
2 number 11 which is the first amended complaint, on page 20  
3 there is a clause that discusses the overdraft fee program.  
4 And in two different places it says in different words when the  
5 customer, the member can be charged an overdraft. The first is  
6 it says when any item is presented. So I've swiped my debit  
7 card, I have made an ATM withdrawal, if your account does not  
8 have sufficient funds -- so let's go back to my example that I  
9 just talked about. Suppose that plaintiff goes to the grocery  
10 store, she has a hundred dollars in her account, she uses her  
11 Advia debit card and she buys \$100 worth of groceries.  
12 Transaction is approved, plaintiff walks out of the store with  
13 her groceries, and Advia is on the hook for transferring the  
14 money to the merchant. Let's suppose then she leaves the  
15 grocery store and she goes across the street and buys \$50 worth  
16 of gas. At that point when she swipes her Advia debit card,  
17 there is no reasonable person in the world that would say, you  
18 know what, I have sufficient funds in my account. Anyone in  
19 the world, Your Honor, using common sense knows I don't have  
20 sufficient funds because I just bought a hundred dollars worth  
21 of groceries across the street. And so the language is  
22 abundantly clear and when it's viewed in light of what --

23 THE COURT: The specific language you're talking  
24 about -- I have written some language out here and under the  
25 heading payment order of items, I have, quote, "If an item is

1 presented without sufficient funds in your account to pay it,  
2 we may, at our discretion, pay the item (creating an overdraft)  
3 or return the item." Then in another paragraph, Courtesy Pay,  
4 discretionary service. Et cetera. Those are the provisions  
5 you're talking about?

6 MR. WILSON: Yes, I'm specifically looking at, again  
7 it's page 20 but it's under the heading that "Overdraft  
8 Courtesy Pay Plan. And in that first paragraph, Your Honor --

9 THE COURT: Here we are.

10 MR. WILSON: It starts, "...To pay any item presented  
11 for payment if your account does not contain sufficient funds."  
12 Then it goes on to explain basically the standing which your  
13 account has to have. But then in the next paragraph, so this  
14 would be in the right-hand column in that same section, it says  
15 "by initiating checks, electronic fund transfers, or other  
16 payment or withdrawal requests for more than is on deposit in  
17 the account."

18 And so what the plaintiff is trying to say is, well,  
19 credit union, what that means is you have to essentially ignore  
20 any of my electronic withdrawals or in this case debit card  
21 purchases. You have to put your blinders on until 24 to  
22 48 hours when those charges actually post and the money is  
23 physically removed from the account.

24 The problem with that, Your Honor, is that it produces  
25 an absolutely absurd result where someone like the plaintiff

1 can start the day with a hundred dollars in her account and  
2 essentially go from merchant to merchant to merchant and make  
3 purchases which exceed her account balance and somehow Advia is  
4 supposed to sit there and say, well, this is not technically an  
5 overdraft yet, although it will be, we are just waiting for the  
6 funds to transfer.

7 It doesn't make, it doesn't pass the common sense  
8 test, Your Honor.

9 And the -- the other thing I'll say is, yes, you  
10 asked Mr. McCune about the definition of ledger balance or  
11 actual balance. I don't see those words anywhere in this  
12 document. I don't see any description of that definition that  
13 he's talking about. And so I believe the case law suggests  
14 that the Court is going, is to interpret the actual words used  
15 in the document, and the Court is to do that in a manner which  
16 doesn't produce absurd results.

17 THE COURT: Talking about how courts interpret it.  
18 Nothing binding on me yet. But there was that case, was it  
19 Nevada I think?

20 MR. WILSON: Yes.

21 THE COURT: And how would you distinguish that?

22 MR. WILSON: I would distinguish that for a couple of  
23 reasons: First, the language used in the account agreements is  
24 different. Mr. McCune has given you I think now three cases  
25 from different jurisdictions.

1           THE COURT: One, one federal court from Washington,  
2           one state court from Washington, then Nevada.

3           MR. WILSON: Correct. And so the language actually  
4           used in those documents is different than what we have here.  
5           What I just read --

6           THE COURT: Okay. Distinguish them for me then.

7           MR. WILSON: Well, I would distinguish it because, for  
8           example, I believe it was the Wodja case, Wodja actually used  
9           the word "available balance." And somehow, I mean I disagree  
10          with the judge in that case, they use the actual language, the  
11          available balance language, and the courts in those cases have  
12          said, essentially, we think there's potentially an ambiguity  
13          here, and so this is not something we're going to decide on  
14          12(b) (6) .

15          The other thing I'll say is, and I reviewed the  
16          pleadings from those cases, I didn't see any arguments, I  
17          didn't see any substantive opinions from the courts in those  
18          cases which address this, this real life situation in which a  
19          member knows they have a certain amount of money in the account  
20          and are then permitted to go around and essential rack up  
21          charges that the credit union is somehow supposed to sit back  
22          and watch it. And more importantly, Your Honor, if I go and I  
23          spend a hundred dollars, my last hundred dollars on groceries,  
24          I know everyone knows at that point that I've spent my last  
25          hundred dollars. And so for me to then go across the street

1 and initiate a charge for \$50 and not expect an overdraft fee  
2 is simply ludicrous. It doesn't make any sense.

3 And there is nothing binding on this Court, as Your  
4 Honor recognizes. The cases which Mr. McCune cites are all  
5 from different jurisdictions. And essentially in each of those  
6 cases the judges have said, you know, we're, we are confused or  
7 we are not quite sure what the words mean. The language that  
8 I've cited to the Court on page 20 in docket number 11 I  
9 believe is completely dispositive of this case.

10 THE COURT: I might have it here right in front of me.

11 MR. WILSON: So it's the two clauses again. We say  
12 you're going to get an overdraft fee when you present an item  
13 for payment if your account does not contain sufficient funds.  
14 Then --

15 THE COURT: Define account, does it --

16 MR. WILSON: Pardon, Your Honor?

17 THE COURT: -- does it define account? In other  
18 words, what is included in the account? You have, you could  
19 have deposit accounts, you can have checking accounts, you can  
20 have pending transactions. If you don't think it's important  
21 you can move on.

22 MR. WILSON: I don't think the distinction is  
23 critical. The point is that the plaintiff is asking the Court  
24 to basically ignore a transaction unless and until the funds  
25 are physically removed, although, the credit union is on the

1 hook for paying the money to the merchant. It for one doesn't  
2 seem fair, and, two, again it doesn't make sense.

3 There's also the language that says you're going to be  
4 charged an overdraft fee by initiating checks, initiating  
5 electronic fund transfers or other payment or withdrawal  
6 requests. So in other words, swiping my card when I initiate  
7 for more than is on deposit in the account.

8 So I don't, I don't read that and say that that means  
9 that the credit union has to ignore transactions which have  
10 been approved but simply are just waiting for the funds to be  
11 removed because of delays in the electronic transfer of funds.  
12 So I think based on this language the Court can and should  
13 dismiss that count.

14 Does the Court have any other questions on that issue?

15 THE COURT: I'm sure I do. Just hold on a minute,  
16 though, if you would, please. Well, okay. Taking a look at  
17 the Gunter case, if there's an ambiguity as to what funds  
18 they're talking about in a particular account, as I read  
19 Gunter, the Court held that an account agreement was ambiguous  
20 as to whether the actual balance or the available balance  
21 should be used to determine the overdraft status. And  
22 therefore stuck the credit union with potential liability.

23 MR. WILSON: I believe that order is simply a motion  
24 denying a 12(b)(6), same situation.

25 THE COURT: That we have here. Okay.

1 MR. MCCUNE: Your Honor, may I address --

2 THE COURT: You will but give him his opportunity,  
3 please. All right. Go ahead.

4 MR. WILSON: I do want to touch on the second count as  
5 well if the Court -- or you want --

6 THE COURT: Second count seems to me to depend upon  
7 how you interpret the first count as to what that language  
8 means. But go ahead.

9 MR. WILSON: And I respectfully disagree with that. I  
10 know that's the conclusion that the Court in Gunter reached,  
11 and I think I can explain why that's incorrect.

12 THE COURT: Go ahead.

13 MR. WILSON: The plaintiff claims that essentially we  
14 didn't make the proper disclosure of our overdraft program as  
15 is required under the Electronic Funds Transfer Act. And that  
16 act through Regulation E requires financial institutions to  
17 make a disclosure about their overdraft program that is  
18 substantially similar to Model Form A-9. And the Regulation E,  
19 Your Honor, is 12 C.F.R. 1005.17. And so if you look at pages  
20 11 through 13 of our reply brief which we filed in support of  
21 the motion, we have actually given the Court a side-by-side  
22 chart showing model disclosure that's required that's put out  
23 by the CFPB, and then the disclosure that we used. And they're  
24 the same, Your Honor. And that's important here because the  
25 EFTA contains a Safe Harbor Provision. It's in 15 U.S.C.

1       Section 1693m(d) (2) . And I have a copy of the statute if the  
2       Court wants it.

3               But that Safe Harbor Provision specifically says that  
4       if the financial institution uses the model language, so in  
5       this case Model Form A-9 --

6               THE COURT: But is it talking about the statute?  
7       Because I do have the reg here in front of me. You're talking  
8       about the statute.

9               MR. WILSON: Yes, Your Honor.

10              THE COURT: Not the reg. I don't have the statute.

11              MR. WILSON: So on the statute, it contains the Safe  
12       Harbor Provision which says that a financial institution is  
13       immune from civil liability. And it's contained in the section  
14       of the statute that deals with civil liability.

15              So for Mr. McCune's client to have a claim here, he's  
16       got to proceed under the statute, and there's a specific Safe  
17       Harbor Provision which says that if the financial institution  
18       uses the model language, it's immune from all civil liability,  
19       including the kind of liability that's alleged here.

20              And, again, we use the model language, and so the  
21       statute says if you use the model language, you cannot be  
22       liable for civil penalties. And so I believe that, again,  
23       Section 1693m(d) (1) and (2) are dispositive of the second claim  
24       for violation of the Electronic Funds Transfer Act.

25              THE COURT: Okay. Good. Thank you very much.



1 MR. WILSON: Thank you, Your Honor.

2 THE COURT: You bet. Okay. Mr. McCune.

3 MR. MCCUNE: Thank you, Your Honor. If I could just  
4 address a few of those points.

5 The first one starts out with counsel reading sections  
6 in the agreement and reading them as when presented. But if  
7 you read the entire thing, each one of those provisions talks  
8 about pay. It's not -- so if he's implying that it's the time  
9 of authorization that matters pursuant to the contract, that's  
10 not what the contract says.

11 If you look in the section that talks about payment of  
12 orders, it talks about the, whether there's sufficient funds or  
13 sufficient money at the time of payment. And that's true in  
14 the payment of order of items or whether you look at the first  
15 sentence on overdraft courtesy pay plan. It references pay.  
16 What it's clearly talking about is at the time of payment is  
17 there enough money. What's not before the Court here is as to  
18 whether they could contract to say, if you don't have enough  
19 available balance at the time we authorize, we can charge an  
20 overdraft fee. You know, if the contract -- maybe they can do  
21 it. But that's not what they contracted for. They contracted  
22 to say, if you don't have enough money in at the time of  
23 payment, it's an overdraft. So that's -- it's at the time of  
24 posting or payment we have to look at.

25 And, again, if you take that and -- so I've provided

1       you an example, but counsel provided you an example too. And  
2       as I understand the example, there was a hundred dollars and  
3       then a charge for a hundred dollars leaving zero, and then a  
4       second charge for \$50. So then the question is why are there  
5       two overdraft fees for that. Because the issue here is that  
6       results in two overdraft fees, not one.

7               We're not claiming that under the alternative or  
8       hypothetical provided by counsel that they can't charge one  
9       overdraft fee. The question and the issue is they charged two  
10      as a result of this. And what we know is this program juices  
11      up overdraft fees about 20 percent for credit unions that do  
12      this. So the issue talking about fairness and what we can and  
13      cannot do, they can charge an overdraft fee under either of the  
14      hypotheticals that we provided the Court. The issue is by  
15      using the available balance, they manage to get two overdraft  
16      fees, even though one overdraft fee transaction was, put the  
17      account in the negative.

18             So in one sense it's really double counting.

19             On the Wodja versus Washington case, counsel is --  
20      I'm in that case, and counsel is incorrect. The state -- I  
21      would not be here in front of the Court in that case or this  
22      case if the contract said we charge overdraft fees based on an  
23      available balance. That's not what the language said.

24             What the language in the Washington case was very  
25      similar to the language here, and identical in the Reg E

1       portion of it and it talks about sufficient funds. But what  
2       every contract has, including Advia's, it has a section on  
3       available funds. So it uses the word available but available  
4       funds is very different from available balance. Available  
5       funds is how quickly or how soon a deposit will clear. If you  
6       were to look at the contract it has a whole section on funds  
7       availability process, and that's under Regulation C that has  
8       nothing to do with available balance, despite the fact it uses  
9       the word available. Those are two different banking concepts.  
10      So Washington did not use the term available balance. There  
11      was some discussion of available funds like there is in every  
12      credit union contract but those are apples and oranges.

13               And then the other point I would like to make is we're  
14      not just randomly picking one balance or another. So we have  
15      got two balances. We are not just randomly picking one or the  
16      other. The available balance is appropriately used for  
17      purposes of the credit union's decision making process. So  
18      they need to know how much is in the account, how much may be  
19      coming into the account so they can decide whether to honor  
20      checks, return checks, authorize debit cards, don't authorize.  
21      All those are fine, appropriate. The issue is taking that  
22      balance, which is designed only for purposes of determining  
23      whether to pay or return an item, whether to authorize or not  
24      return an item, but then using it for purposes of a fee. And  
25      which results in, in increasing fees. And the regulators,

1 through the Consumer Financial Protection Bureau in the winter  
2 of 2015, which is the exhibit that we provided the Court, makes  
3 very clear that if the bank or credit union is going to use  
4 available balance, it better very, very clearly specify it's  
5 using available balance and what it means. And here Advia did  
6 neither. It didn't use the term available balance, doesn't use  
7 it anywhere in the contract, it doesn't define it because it  
8 can't because it didn't use it, but what it does do is talk  
9 about money in the account or sufficient funds which is, if I  
10 pulled out my wallet and you said how much money do I have in  
11 my account, I'm going to count how much I have in there. I'm  
12 not going to say, I have \$40 but, gee, I think I've got to go  
13 to the store to get some milk, so how much money I have is, is  
14 \$30. How much money I have in my wallet is how much money  
15 is -- I open my wallet and I count it.

16 So for purposes of their use of the terminology -- and  
17 remember this is a contract Advia drafted, they could have used  
18 any language they wanted in the world, and what they chose is  
19 to tell customers in a very misleading way that an overdraft is  
20 when there is not enough money in the account or insufficient  
21 funds. So then when we are looking at which balance to use,  
22 the ledger balance is the official balance of the account. It  
23 is the one that if today in this \$10 example I gave you, every  
24 day the credit union has to report to the regulators how much  
25 money the customers have in their account. And so they

1       accumulate it all together and they provide it to their  
2       regulators. It's called a call report. That call report  
3       doesn't use available balance. When they're reporting to the  
4       regulators what's in the account, they use the ledger balance.  
5       If you were to look at a statement, which we will if this case  
6       is allowed to proceed, each of the statements has a balance on  
7       it, just says balance. That balance is a ledger balance. The  
8       account statement that the customers get each month has one  
9       balance on it, and it's not available balance, it's ledger  
10      balance because that's the official account balance.

11               And finally when you see balance scattered throughout  
12      the agreement where they have to pay interest or they have to  
13      do this or that, every one of those is ledger balance.

14               So the courts have said at the very least you have  
15      ambiguous. I mean I certainly believe it's not ambiguous. I  
16      think that if you're not going to clearly define it as  
17      available balance, then the default is the official balance of  
18      the account. But that's, that's an issue that can be decided  
19      by a trier of fact down the line. But for purposes of the  
20      motion to dismiss, at the very least by not using available  
21      balance when that's what they're using, and it's been  
22      criticized by other courts, it's been criticized by the  
23      regulators, I think at the very best is an ambiguous clause.

24               As to the second point that was made to the Regulation  
25      E, there is a specific requirement that here's the starting

1 point for the model form. But what's clear from the  
2 regulators' perspective in that supervisory highlight is  
3 they're expecting the banks and credit unions to be using a  
4 ledger balance. And if they're not, they have to clearly  
5 disclose it. Well, if they have to clearly disclose it in  
6 their account agreement, the Reg E form that is required  
7 specifically for overdrafts, then they have to disclose it  
8 there. And by not disclosing it, it inaccurately describes the  
9 overdraft program which is a violation of Reg E.

10 THE COURT: Okay. Thank you.

11 MR. WILSON: I just want to make sure I'm hearing  
12 things correct. Because it sounded to me like Mr. McCune said  
13 with regard to my hypothetical about the gas and groceries that  
14 it's okay to charge an overdraft fee; using my hypothetical,  
15 one overdraft fee when I go to the gas station and I buy the  
16 \$50 worth of gas after I already bought a hundred dollars worth  
17 of groceries. What --

18 THE COURT: Now you said, you know, let's see if  
19 you're putting words in his mouth. I don't think you are. But  
20 Mr. McCune --

21 MR. MCCUNE: No, Your Honor. If you have two  
22 transactions that together are greater than the ledger balance,  
23 we are not disputing they can charge an overdraft fee. But  
24 only one of those two transactions, whichever one you want to  
25 pick first, goes over the ledger balance. So one overdraft fee

1 is one thing, but our complaint here is they charged two  
2 overdraft fees in this scenario that I'm providing.

3 THE COURT: What is the rule if you have two checks  
4 each of them goes over the outstanding balance? In other  
5 words, one is for -- \$100 balance, one is for 110, one is for  
6 125, do you charge two overdraft fees then?

7 MR. MCCUNE: If there are three checks?

8 THE COURT: No, the balance a hundred dollars, first  
9 check is 110, the second check is 125.

10 MR. MCCUNE: Correct. We have no dispute, that's two  
11 overdraft fees.

12 THE COURT: Two overdraft.

13 MR. MCCUNE: Yes.

14 MR. WILSON: What I want to make clear to the Court  
15 again, and why I guess I'm confused is because this issue of us  
16 charging two overdraft fees in the hypothetical I just  
17 discussed is completely false and fabricated. And if that's  
18 what the substance of the claim is here, then at a minimum this  
19 complaint needs to be amended because the example that we're  
20 given in the complaint at paragraph 19 is not this notion that  
21 the problem with what we're doing is that we are dinging them  
22 both on the hundred charge and again on the \$50 charge. We  
23 don't do that. And so if that's what Mr. McCune is saying, I  
24 would like him to plead that specifically so we can properly  
25 respond to it. But that's not what his complaint says. His

1 complaint is alleging, again, I believe in line with my  
2 hypothetical, that he's being charged one overdraft fee when  
3 the transaction is initiated, and his complaint is that we  
4 shouldn't be charging an overdraft fee until the transactions  
5 all post. And so if the problem as he sees it is that there's  
6 multiple overdraft fees for one overdraft, then I think at a  
7 minimum the Court needs to ask him to replead this complaint  
8 because it's not what it says.

9 With regard to the second claim, the Electronic Funds  
10 Transfer Act, I think it's significant that Mr. McCune didn't  
11 feel the need to respond to the Safe Harbor Provision because  
12 it's absolutely dispositive of this count. And it's important  
13 here, Your Honor, and I'll give you an example; in Wodja,  
14 Mr. McCune's firm I think voluntarily dismissed their  
15 Electronic Funds Transfer Act after counsel there brought up  
16 the Safe Harbor Provision, and I believe that case was just  
17 recently dismissed from federal court based upon a lack of  
18 subject matter jurisdiction.

19 And so I think at a minimum based on the Safe Harbor  
20 Provision, the EFTA claim has to go. And I think if it is  
21 dismissed then the next logical step is to determine whether  
22 this Court still has subject matter jurisdiction. I would  
23 submit that it would not.

24 THE COURT: Well, that's something I've considered,  
25 not about the dismissal, but whether we had subject matter



1 jurisdiction, and of course you have it if you have the  
2 violation of the Electronic Funds Transfer Act. But I didn't  
3 see five million dollars. Maybe there is five million dollars  
4 possible damages here.

5 MR. MCCUNE: I am pretty sure we can meet that in this  
6 case because of the size of Advia, Your Honor.

7 THE COURT: Okay.

8 MR. MCCUNE: The issue in the Washington case had to  
9 do with under CAFA, where the consumers were located. It had  
10 nothing to do with the Safe Harbor Act. It had nothing to do  
11 with Reg E. It had to do with where the consumers were  
12 located.

13 MR. WILSON: And I'll submit to the Court that the  
14 same exact situation is going to arise in this case under CAFA  
15 because we meet the threshold for membership. I think it's  
16 two-thirds of the members have to reside in the same state as  
17 the defendant entity, and that's -- we are right on point.  
18 And, again, I'm still not hearing --

19 THE COURT: Try one case at a time.

20 MR. WILSON: Fair enough. I just, I think again, it's  
21 important, there's -- the statute, and I can't emphasize it  
22 enough, it's plain as day in my opinion that when you comply  
23 with the model disclosure, you're immune from liability under  
24 the act.

25 THE COURT: All right.

1 MR. WILSON: Thank you, Your Honor.

2 THE COURT: Thank you. Well, thanks, counsel. You  
3 wanted to say something again? This has been very helpful to  
4 me, frankly, and I appreciate you having come. Oral argument,  
5 a lot of judges don't give it anymore. I tend to give it if  
6 anyone wants it. But I'm glad I did it in this case because I  
7 learned something. You helped clarify in my own mind where  
8 we're going.

9 MR. MCCUNE: Thank you, Your Honor.

10 THE COURT: So thank you. You're excused.

11 MR. WILSON: Thank you, Your Honor.

12 THE CLERK: All rise, please.

13 THE LAW CLERK: All rise, please. Court is adjourned.

14 (Proceedings concluded, 11:40 a.m.)  
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## C E R T I F I C A T E

I certify that the foregoing is a transcript from the Liberty Court Recording System digital recording of the proceedings in the above-entitled matter to the best of my ability.

/s/ Kathy J. Anderson

Kathy J. Anderson, RPR, FCRR

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